2. " . . . usage of interstate information services, and in particular the Internet and other interactive computer networks, has increased significantly." ¶ 341 (emphasis added)

3. "As a result of the decisions the Commission made in the *Access Charge Reconsideration Order*, ISPs may purchase services from incumbent LECs under the same intrastate tariffs available to end users. ISPs may pay business line rates and the appropriate subscriber line charge, rather than interstate access rates, even for calls that appear to traverse state boundaries. The business line rates are significantly lower than the equivalent interstate access charges, given the ISP's high volumes of usage." ¶ 342

4. "In the NPRM, we initially concluded that ISPs should not be required to pay interstate access charges as currently constituted." ¶ 343

5. "We therefore concluded that ISPs should remain classified as end users for purposes of the access charge system." ¶ 348

These comments and others in the 1997 Order clearly show that the FCC, as it has in all of its proceedings from 1983 to the present, continues to assert its jurisdictional authority over rates, usage and costs for access to the Internet.

B. ON AN END-TO-END BASIS, INTERNET CALLS ARE JURISDICTIONALLY INTERSTATE. CONSEQUENTLY, INTERNET ACCESS FACILITIES ARE JURISDICTIONALLY INTERSTATE.

The legal and FCC standard for determining the jurisdiction of a call is its end-to-end use. Even if the transmission has identifiable sub-parts or components (circuit or packet switched, voice or information, LEC or ISP, etc.) an end-to-end transmission must always be analyzed as a single event from its initiation to the ultimate destination that a customer expects to reach.

In the glossary of Part 36 of the FCC's Rules and Regulations (the Separations Manual), station-to-station or end-to-end is defined as: "...The term applied to the basis of toll ratemaking which contemplates that the message toll service charge...covers the use made of all facilities between the originating station and the terminating station, including the stations and the services rendered in connection therewith." In other words, usage is to be measured from the originating customer's end or station to the terminating customer's end or station (not at some intermediate point such as the ISP's location) to determine the call or message jurisdiction The Manual also defines "message" in the glossary as:

"A completed call, i.e., a communication in which a conversation or exchange of information took place between the calling and called parties." For Internet calls, the ISP's charge to the customer is analogous to the toll charge discussed in the Manual. The jurisdiction of the network access used by ISP customers is determined by the end-to-end destination that the customer wants to reach. On an end-to-end basis, the vast majority of Internet calls are not local but are interstate or international.

C. USAGE MEASUREMENT PROCEDURES ARE NOW AVAILABLE TO IDENTIFY INTERNET ACCESS USAGE.

In the FCC's Memorandum Opinion and Order in CC Docket No. 78-72, released August 22, 1983, at ¶ 84, the FCC stated regarding the ESP exemption that:

> "The case for a transition to avoid this rate shock is made more compelling by our recognition that it will take time to develop a comprehensive plan for detecting all such usage..."

In the FCC's NPRM in CC Docket No. 89-79, released May 9, 1989, at Footnote 67, regarding the ESP usage measurement issue, the FCC stated:

> "We recognize that jurisdictional measurement of enhanced service traffic may present particular difficulties. ESPs may not always be able to discern the ultimate destination of a call (for example, when traffic is transmitted from one packet network to another) and there may be questions concerning whether a single call can have both interstate and intrastate components (for example, when a computer user during a single session interacts sequentially with a number of data bases in different states). Nevertheless, we think the EES method, perhaps with some reasonable accommodations for special circumstances presented by certain types of enhanced traffic, should be workable for ESPs."

In 1991 in a Report and Order on Further Reconsideration and Supplemental Notice of Proposed Rulemaking in CC Docket Nos. 89-79 and 87-313, released July 11, 1991, at ¶¶ 67 and 68, the FCC rejected the notion that ESP traffic should be measured as local usage:

> "Florida states its belief that 'the nature of the access should be determined from the point of the call's origination to the point of the ESP's location' ...Most ESPs argue that the EES method is inadequate. They argue that neither ESP customers nor ESPs are able to ascertain accurately which calls are interstate and

which are intrastate. They complain that the cost of measuring currently unmeasured traffic would be prohibitive ... Decision. The record does not clearly indicate that a new rule is necessary." (Underlining added, Footnotes deleted).

In a NPRM and NOI in CC Docket Nos. 96-262, 94-1, 91-213 and 96-263 released December 24, 1996, at ¶ 315, the FCC was still seeking information on measurement of Internet usage:

> "...we seek comment on jurisdictional, metering and billing questions, given the difficulty of applying jurisdictional divisions or time sensitive rates to packet-switched networks such as the Internet." (Footnotes deleted)

The FCC, in this series of Orders dealing with measurement of Internet usage has clearly indicated that:

1. Lack of usage measurements for Internet traffic is one of the reasons for continuing the access charge exemption.
2. The jurisdiction of Internet usage is not local because it is not determined based on the location of the originator of the call and the location of the ISP or ESP, but based on the end-to-end destination.
3. Entry/Exit Surrogates (EES) may be used to determine the jurisdiction of Internet usage. Under this method, the jurisdiction would be determined from the ISP's point of presence (POP) to the interstate destination of the call.
4. Further comments on other measurement procedures were requested. For some time SBC has been attempting to develop procedures to identify intrastate usage. EES has not been available from ISPs. Consequently, SBC pursued other measurement possibilities.

As previously discussed in January 20, 1998 and February 23, 1998 letters to the FCC, SBC explained that it has developed measurement procedures to identify Internet usage. These procedures are briefly described in SBC's response to questions in the February 23, 1998 letter and were more fully described in a February 27, 1998 meeting on this issue with the FCC. The procedure SBC utilized requires that SBC identify the seven-digit ISP Internet access number used by the customer and then match all measured originating ISP Internet usage with that number. A more efficient and straightforward process would be for the CLEC to provide to SBC all Internet access numbers for ISPs connected to it which could then be matched with SBC's measured originating usage to determine Internet usage. SBC is providing to CLECs these numbers for its identification of ISP Internet usage. Unfortunately, CLECs have,

as yet, been unwilling to reciprocate. As Internet usage is identified through SBC's measurement process, it is being removed from local and assigned to interstate.

In the March 25, 1998 Ex Parte letter on page 2 are excerpts from three FCC orders regarding the end-to-end basis for determining the jurisdiction of a call.

In addition to the cases cited in that letter, the following FCC and Court cases make it clear that the end-to-end use by the customer determines the jurisdiction of a call. Jurisdiction is not determined by (a) location of facilities (local exchange facilities within a state), (b) the type of facility (circuit switched or packet) or (c) the nature of regulation of the facilities provider.

a) Smith v. Illinois Bell, 282 U.S. 133,150-51 (1930): Notwithstanding "the practical difficulty of dividing the property between the interstate and intrastate services," one cannot "ignore altogether the actual uses to which the property is put. It is obvious that, unless an apportionment is made, the intrastate service to which the exchange property is allocated will bear an undue burden."

b) *United States v. AT&T*, 57 F. Supp. 451, 454 (S.D.N.Y. 1994), *aff'd sub nom. Hotel Astor v. United States*, 325 U.S. 837 (1945) (per curiam). "That the Communications Act contemplates the regulation of interstate wire communication from its inception to its completion is confirmed by the language of the statue and by judicial decisions."

c) *Southwestern Bell Tel. Co. Transmittal Nos. 1537 and 1560 Revisions to Tariff F.C.C. No. 68, Order Designating Issues for Investigation*, CC Docket 88-180 (released April 22, 1988), 3 FCC Rcd. 2339. The FCC confirmed that a call forming a transmission "loop" that passes between two states is interstate, even if one or more segments of its communications path pass through systems that also could serve purely local traffic. For instance, when long-distance carriers began using 1-800 numbers (for credit-card calls and similar purposes), Southwestern Bell contended that two calls were created by the "second dial tone" heard when the long-distance carrier was reached. The FCC rejected that theory because the entire transaction was required to be treated as one communications event. *Id.* ¶¶ 24 - 28, Citing *NARUC v. FCC*, 746 F.2d 1492 (D.C. Cir. 1984), the FCC held that "[s]witching at the credit card switch is an intermediate step in a single end-to-end communication." *Id.* ¶ 28. "[T]he jurisdictional nature of a call is determined by its ultimate origination and termination, and not ... its intermediate routing." *Id.* ¶ 26. *See also United States v. AT&T*, 57 F. Supp. 451 (S.D.N.Y 1944)

(hotel PBX used to make or receive long-distance calls is not a distinct local exchange service, but rather is part of a single end-to-end communication), *aff'd sub nom. Hotel Astor v. United States*, 325 U.S. 837 (1945) (per curiam). (emphasis added)

d) *In re Long Distance/USA, Inc.* (released Feb. 14, 1995), 10 FCC Rcd. 1634, ¶ 13; *see also In re Teleconnect Co.* (released Feb 14, 1995), 10 FCC Rcd. 1626 ¶ 12 (same principles applied). The FCC explained:

"[B]oth court and Commission decisions have considered the end-to-end nature of the communications more significant than the facilities used to complete such communications ... [W]e regulate an interstate wire communication ... from its inception to its completion ... [A] single interstate communication ... does not become two communications because it passes through intermediate switching facilities."

Under this extensive body of precedent, an Internet communication is a single telecommunications event for purposes of jurisdictional analysis, and the location of intermediate facilities cannot transform an interstate event into two jurisdictionally separate components.

That result is not altered in any way by the FCC's Universal Service decision (*Universal Service Order* ¶ 83). That FCC order and the majority of the recent FCC Report to Congress dealt not with whether Internet traffic should be treated as local or interstate, but rather with the wholly unrelated issue of which kinds of services should receive or pay for "Universal Service" support. Nothing in that order or the Report to Congress undermined either the consistent FCC decisions treating Internet communications as interstate or the equally uniform FCC precedent rejecting attempts to bifurcate a single end-to-end communication.

D. THE MIXED USE PRINCIPLE IS APPLICABLE TO INTERNET USAGE

The mixed use of principle, previously applied by the FCC, is applicable to Internet usage, which may be (possibly during a single call) interstate, international or local because:

- Like Feature Group A service, the customer does not dial 1+ or 0+, but normally dials only seven digits to reach an ISP. Consequently, the jurisdiction is not readily identifiable or measurable as a result of the number of digits dialed.

- Numerous interconnected companies including LECs, Competitive Local Exchange Carriers (CLECs), IXCs and ISPs may be involved in handling the

call which may be terminated anywhere in the United States or the world. Consequently, without significant administrative expense to develop a jurisdiction reporting, auditing and verification procedure for all of the parties handling the calls, or significant investment in measuring equipment by all of the parties, the end-to-end jurisdiction of the call cannot be determined. Even if reporting or measuring is attempted, it may be virtually impossible to measure or to determine appropriate reported jurisdictional usage because of the ability of the Internet, on a real time basis, to deliver calls (interstate, intrastate or international) simultaneously.

- Like 800 service calls, numerous calls from anywhere in the United States or the world may be delivered to an Internet bulletin board or a chat line. Consequently, calling can be international, interstate or intrastate.

For these reasons, determining the jurisdiction of ISP Internet usage and segregating it between local, intrastate intraLATA and interstate and intrastate access may be impossible. Even if the Commission were inclined to order ISPs to track the jurisdiction of all calls, it would be virtually impossible for ISPs to comply because the end user may "visit" many different sites during a single connection to the Internet, including more than one site at the same time. Consequently, the usage is interstate because, like the special access service dealt with in the FCC's "contamination" order, (CC Docket Nos. 78-72, 80-286, Released July 20, 1989, Decision and Order), the jurisdiction of ISP Internet calls cannot practically be measured or reported, but on an end-to-end basis, at least ten percent is interstate.

Imperical analysis as well as the few studies that have been done, indicates that well more than 10% of Internet usage is interstate or international. For instance, an analyses performed by SBC indicates that 92 to 99% (depending on the state) of the Internet usage it carries is interstate.

E. RECENT COURT CASES HAVE TREATED INTERNET USAGE AS INTERSTATE

The courts have treated Internet usage as interstate. During the summer of 1996, a three-judge federal panel treated Internet traffic as interstate in nature. The issue in *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), was whether First Amendment rights for Internet communications were infringed by the Communications Decency Act (the "CDA"; part of the 1996 Act, codified at 47 U.S.C § 223). Because the relevant provision applies only to "interstate or foreign communications" (47 U.S.C. § 223(a)(1)), the statue would be entirely inapplicable to Internet traffic if it were not interstate. While the court struck down portions of the CDA, the pertinent point here is that the court

necessarily understood Internet communications to be interstate. See, 929 F. Supp. at 830-44 (describing the nature, function and uses of the Internet).

This *Reno* decision was consistent with other contemporaneous precedent treating the Internet as inherently interstate. For example, *Malarkey-Taylor Assocs., Inc., v. Cellular Telecomm. Indus. Ass'n*, 929 F. Supp. 473 (D.D.C 1996), applied the Lanham Act, which has an "interstate commerce" element, to statements made on an Internet site. In addition, ISPs had been recognized as intermediaries, not the "termination" point of Internet connections. *Religious Tech. Ctr. v. Netcom On-Line Comm. Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995), involved Netcom, a "large Internet access provider" (*id.* at 1365) that did "not create or control the content of the information available to its subscriber" (*id.* at 1368). The court noted that although Netcom's computer systems copied and stored information its subscribers sent onto or gathered from the Internet, "Netcom compares itself to a common carrier that merely acts as a passive conduit for information." *Id.* at 1369 & n. 12.

The Supreme Court issued an opinion agreeing with the District Court's ruling in *Reno* and again treated Internet communications as subject to the CDA (and, thus, as jurisdictionally interstate traffic). *Reno v. American Civil Liberties Union*, ____ U.S. ____, 117 S.Ct. 2329 (1997). Describing the Internet as "an international network of interconnected computers" (*id.*, 117 S.Ct. at 2334) that allowed information "stored in different computers all over the world" to be available to a "world-wide audience" (*id* at 2335), the Court analyzed section 223(a) (*id.* at 2338) and partially invalidated it (*id* at 2351). The Court made it clear that the Internet is a world-wide network, not "located in [any] particular geographical location" (*id.* at 2335).

Other federal court decisions are in accord with this understanding. For instance, in *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997), the district court struck down a New York State statute that purported to regulate Internet communications. Describing the Internet as "a decentralized, global communications medium" (*id.* at 164), the court rejected the State's argument that its Act was "aimed solely at intrastate conduct" (*id.* at 169). "The New York Act," wrote the court, "cannot effectively be limited to purely intrastate communications over the Internet because no such communications exist. No user could reliably restrict her communications only to New York recipients." *Id.* at 171.

In *Planned Parenthood Federation v. Bucci*, 1997 WL 133313, S.D.N.Y., S.D.N.Y., Mar. 24, 1997, at *3, the court wrote that "Internet users constitute a national, even international, audience, who must use interstate telephone lines to access defendant's web site on the Internet." The court also held that web

sites accessible to Internet users "satisfy the Lanham Act's 'in [interstate] commerce' requirement") (copy in Appendix B, at Tab B-2). *See also United States v. Carroll*, 105 F.3d 740, 742 (1st Cir. 1997) ("Transmission of photographs by means of the Internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce" for purposes of federal criminal laws), *cert. denied* 117 S.Ct. 2424 (1997); *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y 1996) (for *in personam* jurisdiction analysis, a web site located in Missouri is not "local" in New York, and the site's accessibility from there does not create personal jurisdiction).

These decisions establish beyond doubt that the law in existence at the time these agreements were executed -- and indeed the law in existence today -- was that Internet communications constitute interstate and thus not "local traffic."

CERTIFICATE OF SERVICE

I, Robin Ostresh, hereby certify that the foregoing, "DIRECT CASE OF PACIFIC BELL," in CC Docket No. 98-103 has been filed this 11th day of September, 1998 to the Parties of Record.

Robin Ostresh

Robin Ostresh

September 11, 1998

J. Manning Lee
Teleport Communications Group Inc.
Vice President, Regulatory Affairs
Two Teleport Drive, Suite 300
Staten Island, NY 10311
Fax: 718-355-4876

George Vradenburg III
William W. Burrington
Jill A. Lesser
Steven N. Teplitz
America Online Inc.
1101 Connecticut Avenue, NW Suite 400
Washington, DC 20036

Barbara A. Dooley
Executive directory
Commercial Internet eXchange Assoc.
1401 Sterling Road, Suite 104A
Herndon, VA 20170

Thomas M. Koutsky
COVAD Communications Company
6849 Old Dominion Drive, Suite 220
McLean, VA 22101

James A. Kirkland
James J. Vaentino
Mitz Levin Cohn Ferris Glovsky and Popeo
Counsel for California Cable
Television Association
701 Pennsylvania Avenue, NW, Suite 900
Washington, DC 20004-2608

Richard J. Metzger
Vice President & General Counsel
Association for Local
Telecommunications Services
888 17th Street, NW, Suite 900
Washington, DC 20006

Laura H. Phillips
J. G. Harrington
Dow Lohnes & Albertson
Counsel for Cox Communications, Inc.
1200 New Hampshire Avenue, NW
Washington DC 20036

Alan Buzacott
Regulatory Analyst
MCI Telecommunications Corporation
1801 Pennsylvania Avenue NW
Washington, DC 20006

Steven Gorosh
Vice President & General Counsel
Northpoint Communications Inc.
222 Sutter Street
San Francisco, CA 94108

Leon M. Kestenbaum
Jay C. Keithley
Sprint Corporation
1850 M Street, NW, 11th Floor
Washington, DC 20036

Jeffrey Blumenfeld
Christy C. Kunin
Blumenfeld & Cohen
Counsel for ACI Corp.
1615 M Street, N.W., Suite 700
Washington, DC 20036

Federal Communications Commission
Competitive Pricing Division
Common Carrier Bureau
1919 M Street, NW, Rm 518
Washington, DC 20554

ITS INC
1231 20th Street, N.W.
Washington, D.C. 20036

CERTIFICATE OF SERVICE

I, Robin Ostresh, hereby certify that the foregoing, "Comments in Support of BellSouth's ADSL Tariff," in CC Docket No. 98-161 have been filed this 18th day of September, 1998 to the Parties on the attached service list.

Robin Ostresh

September 18, 1998

RILEY M MURPHY
EVP LEGAL AND REGULATORY AFFAIRS
JAMES C FALVEY
VP REGULATORY AFFAIRS
ESPIRE COMMUNICATIONS INC
133 NATIONAL BUSINESS PARKWAY SUITE 200
ANNAPOLIS JUNCTION MARYLAND 20701

BRAD E MUTSCHELKNAUS
EDWARD A YORKGITIS JR
JOHN J HEITMANN
E SPIRE COMMUNICATIONS INC
KELLEY DRYE & WARREN LLP
1200 19TH STREET NW 5TH FLOOR
WASHINGTON D.C. 20036

JEFFREY BLUMENFELD
CHRISTY C KUNIN
LISA N ANDERSON
ACI CORPORATION
BLEMENFELD & COHEN
1615 M STREET NW SUITE 700
WASHINGTON D.C. 20036

STEVEN GOROSH
VP & GENERAL COUNSEL
NORTH POINT COMMUNICATIONS INC
222 SUTRA STREET
SAN FRANCISCO CA 94108

RICHARD J METZGER
VP & GENERAL COUNSEL
ALTS
888 17TH STREET NW SUITE 900
WASHINGTON D.C. 20006

ITS INC
1231 20TH STREET NW
WASHINGTON D.C. 20036

KENT Y NAKAMURAK
SPRINT CORPORATION
1850 M STREET NW 11TH FLOOR
WASHINGTON D.C. 20036

RICHARD M RINDLER
MICHAEL W FLEMMING
COUNSEL FOR HYPERION COMMUNICATIONS
INC, ITC DELTACOM COMMUNICATIONS,
KMC TELECOM AND ICG COMMUNICATIONS I
SWIDLER BERLIN SHEREFF FRIEDMAN LLP
3000 K STREET NW
WASHINGTON D.C. 20007

GEORGE VRADENBURG III
WILLIAM W BURRINGTON
JILL A LESSER
STEVEN N TEPLITZ
AMERICA ONLINE INC
1101 CONNECTICUT AVENUE NW STE 4001
WASHINGTON D.C. 20036

DONNA N LAMPERT
AMERICA ONLINE INC
MINTZ LEVIN COHN FERRIS
GLOVSKY AND POPEO PC
701 PENNSYLVANIA AVENUE NW SUITE 900
WASHINGTON D.C. 20004-3608

COMPETITIVE PRICING DIVISION (2 COPIES)
COMMON CARRIER BUREAU
1919 M STREET NW RM 518
WASHINGTON DC 20554

GAIL POLIVY
GTE SERICE CORPORATION
1850 M STREET NW STE 1200
WASHINGTON DC 20036

M ROBERT SUTHERLAND
RICHARD M SBRATTA
BELLSOUTH TELECOMMUNICATIONS INC
1155 PEACHTREE STREET NE
ATLANTA GA 30306-3610